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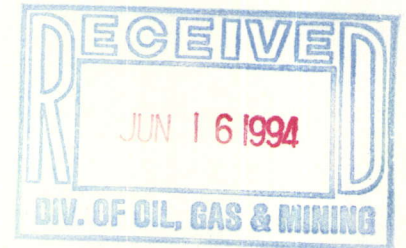
NEW YORK
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cc: JWC
AG's
DWH
orig. mine
file

June 13, 1994

DIRECT DIAL NUMBER
(303) 592-2265

Mr. James W. Carter, Director
Utah Division of Oil, Gas and Mining
355 West North Temple
3 Triad Center - Suite 350
Salt Lake City, Utah 84180-1203



Re: Drum Mine - File No. M/027/007
Millard County, Utah

Dear Mr. Carter:

As you may know, Western States Minerals Corp. ("WSMC") has recently won a final judgment against Jumbo Mining Co. and ASOMA (Utah) Inc. in the Colorado lawsuit over ASOMA's reclamation responsibility at the Drum Mine. I have enclosed for your reference a copy of Judge Woodford's Findings of Fact and Conclusions of Law and Judgment (the "Judgment"), dated May 16, 1994, in the case of Western States Minerals Corp. v. ASOMA (Utah) Inc., et al.

The Judgment represents the final determination of reclamation responsibility for the Drum Mine. The Colorado court found that ASOMA had agreed to take on all reclamation at the Drum Mine site as a part of its purchase contract with WSMC. Specifically, the court has ordered ASOMA "to forthwith perform all contract obligations to assume all reclamation at the Drum Mine . . . [including] undertaking forthwith whatever bonding requirements are required by . . . the State of Utah . . ." ASOMA's lawyer stated in court that ASOMA would immediately begin the process of posting a bond with your office sufficient to cover all reclamation at the mine, including any topsoil deficiency.

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Now that the court case has been concluded in WSMC's favor, WSMC is understandably eager to see this matter resolved in your office. They would be happy to cooperate in any way to facilitate the complete transfer of their mining permit No. M/027/007, and associated reclamation responsibilities, to ASOMA as quickly as possible.

If you have any questions about the enclosed Judgment please do not hesitate to call me. We look forward to resolving this reclamation matter soon.

Sincerely,


Stephen D. Alfors 

SDA/je
Enclosure

cc: Bill Richards, Esq. DOGM, w/encl.
Mr. Arden B. Morrow, WSMC, w/o encl.
Mr. John Carmody, WSMC, w/o encl.
Mr. Allan Cerny, WSMC, w/o encl.
Lee Foreman, Esq., w/o encl.

23506-17
FILE

Court Docs

DISTRICT COURT, COUNTY OF JEFFERSON, STATE OF COLORADO

Case No. 90-CV-3966, Division 9

**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT ON ALL
REMAINING NON-REFORMATION ISSUES**

WESTERN STATES MINERALS CORPORATION,
a Utah corporation,

Plaintiff,

v.

ASOMA (UTAH), INC., a Delaware
corporation, JUMBO MINING CO., an
unincorporated association,
ED B. KING, a/k/a E.B. KING, and
JANET KING,

Defendants.

The parties have agreed and the Court has ordered that all evidence at the preliminary injunction hearing heard March 31, 1991, and all evidence admitted at the Phase One trial as reflected in the transcript of the Phase One trial which was heard in May, 1992, as well as evidence heard in this Phase Two proceeding beginning May 2, 1994, shall be considered as part of the evidence for this Court's ruling on all remaining issues.

Plaintiff, Western States Minerals Corporation ("Western"), sold a gold mining operation in Utah to Defendants ASOMA and Jumbo. At all pertinent times Defendant Edwin B. King was acting for ASOMA and Jumbo. On October 8, 1992, this Court entered Findings of Fact, Conclusions of Law and Orders reforming the contract for the

sale of the Drum Mine by Western to Defendants in a proceeding referred to as Phase One. Judgment entered on Western's claim for reformation, the second claim in its Complaint, on February 23, 1993, nunc pro tunc to January 27, 1993. The contract has now been reformed. The Court incorporates the Findings of Fact and Conclusions of Law from October 8, 1992, in this Order.

FACTS

On June 30, 1988, Mr. King, acting on behalf of the Defendant ASOMA entered into an option agreement to purchase the Drum Mine from Western. Jumbo Mining Company is the successor in interest to ASOMA and is a Defendant in this action as well. Defendants knew that the Quitclaim Deed that was part of the Agreement was supposed to say that the "Assignee" (i.e. ASOMA) had the responsibility for reclamation at the mine. Defendants knew that the Quitclaim Deed contained an error which said Assignor had the obligation to reclaim. Defendants nonetheless went ahead and closed on the contract on October 12, 1988, knowing there was an error in the Quitclaim Deed.

The Defendants in fact had agreed to be responsible for all reclamation on the lode mining claims and the properties. The parties and Mr. King on behalf of the companies he represented had discussed the reclamation matter during the 90 day due diligence period prior to closing on October 12, 1988. Prior to closing, Mr. King obtained information concerning heaps which were built by Western without first receiving construction permits, and he

learned that there was a shortage of stockpiled topsoil which would be needed to reclaim the mine site when the mining operation was finished. Defendants agreed to do complete reclamation, specifically including the taking care of unpermitted heaps and the topsoil problem.

The evidence established that reclamation requires the posting of a bond with the state of Utah. The parties contemplated that reclamation, as the term is used in this contract, included putting up a reclamation bond. Mr. King knew that the state of Utah required it, the parties discussed the reclamation matter, and Mr. King conceded during the due diligence period in his conversations with Mr. Cerny that he was obliged to post a bond but was having difficulty in obtaining one. While the contract does not require Defendants to post bond before closing, the evidence establishes that the posting of a bond is a requirement of reclamation. Because the parties intended and the Defendants agreed that Defendants would assume all reclamation, the contract therefore requires the Defendants to assume all reclamation at the Drum Mine site, specifically including the posting of a reclamation bond sufficient to bond all reclamation at the mine.

After closing, things did not go well for Mr. King and his companies. He at first acknowledged that he was to do all the reclamation work; later his stance changed radically and he wrote a letter telling Mr. Cerny of Western that Defendants were only going to do reclamation work on the areas that they mined, taking

the stance for the first time that he had no duties to reclaim previously disturbed areas of the mine. He also communicated this to people at the Division of Oil, Gas and Mining (DOGM) in Utah. He then furnished them maps which, for the first time, contradicted previous maps he had furnished to the Utah authorities. The new maps showed areas where Defendants asserted Western had to do reclamation. In the letter he wrote to Mr. Cerny, Mr. King enclosed a partial copy of the contract and pointed out the provision that "Assignor shall be responsible" for reclamation at the mine. This conduct by Defendants was a clear, unequivocal repudiation of the contract requirement that they assume all reclamation responsibilities at the Drum Mine, and it was a breach of that contract.

The Defendants apparently assert that Western breached the contract at closing by a failure to deliver the mining permit. This contention is not supported by the evidence. The evidence establishes that there had to be a transfer of the mining permit through the Utah authorities from Western to Defendants, and that no one contemplated that the permit could be completed and delivered at the time of closing. A permit transfer could not be completed until the new operator, ASOMA and Jumbo, posted a new bond. This evidence establishes that the operating permit could not be delivered at closing and was not expected to be delivered at closing by the parties. Western cooperated in delivering documents and maps and other materials to effect a complete change of

ownership, and both Mr. King and the experts testified that the permit could not be transferred at the time of closing. I therefore find there was no breach of contract by Western in that regard. The evidence does show that at a time subsequent to Defendants' breach of contract and Defendants' repudiation of their reclamation responsibilities, Western did report to DOGM that Defendants were conducting tests on some of the unpermitted heaps and that Western objected to Defendants' actions. This caused Defendants' testing by sprinkling on those heaps to be shut down. Given the prior anticipatory repudiation of the contract by Defendants, this conduct by Western is neither an actionable breach of contract or a breach of contract.

Western has presented evidence in support of its claim for damages for breach of contract. That evidence was presented through the testimony of John Carmody, Western's Vice President in charge of administration and accounting, and through Exhibit 97A through E. Mr. Carmody testified to approximately \$142,000 in damages consisting of: fees paid by Western to attorneys representing Western in administrative matters before the Utah mining authorities; miscellaneous expenses described as related to those matters and efforts to resolve the dispute over reclamation with Utah authorities; and labor costs to Western States. With the exception of damages claimed for Western's payments of reclamation bond premiums from the date of closing in October 1988 to the present, the Court disallowed the evidence of these damages on

Defendants' motion at the conclusion of the trial. The Court concluded that although evidence of payment of the bills to attorneys may be some evidence of reasonableness, the Court was not persuaded that it is reasonable to allow those items as damages when the Western timeslips included charges in 8 hour increments and attorney fees included multiple attorneys billing for the same work. As to the remainder of the damages claimed, the Court finds no evidence establishing that those costs and amounts were incurred as a consequence of Defendants' breach or that they were reasonable. Plaintiff failed to establish reasonableness of the attorney fees or the time and fees of Western personnel. As to the remaining area of damages, the bond premiums paid by Western to its insurer for the reclamation bond in Utah, there was not enough definite evidence to establish that the bond premiums can be categorized as damages for the breach of contract that was proven.

The Court makes no findings on the alleged "groundwater problem" or other "buried bodies" to which Mr. King has testified. There is little evidence in the record on the alleged groundwater problem. It was first discovered in 1989. There is no evidence that the parties knew anything about it prior to the time of closing. I do not find the remedying of the groundwater problem to be included within the contracting parties' understanding of the term reclamation. This Order and Judgment therefore does not address it.

CONCLUSIONS OF LAW

There are unique circumstances in this case which justify the order of specific performance by Defendants.

A court has discretion to order specific performance under a contract where the contract shows that a party is clearly entitled to the relief it seeks, and where a remedy at law is inadequate. Hill v. Chambers, 136 Colo. 129, 314 P.2d 707 (1957). Western has shown its entitlement to this relief, and Defendants shall be required to perform all contract obligations to assume all reclamation at the Drum Mine site, specifically including undertaking the bonding requirements imposed by the appropriate public authorities in the state of Utah.

A party to a contract who repudiates the contract before the time when his performance is to be completed commits a breach of the contract. Repudiation will give rise to a claim for breach of contract when the repudiating party shows, by words or conduct, or both, a clear and definite intention not to perform the contract. 4 A. Corbin, Contracts, § 959 (1951); Restatement 2d, Contracts, § 250 (1981). Defendants clearly repudiated and breached their contract with Western when they stated to Western and to the Utah authorities that they did not intend to be responsible for all reclamation at the mine, notwithstanding their contractual obligation to accept all reclamation obligations.

The party committing the first substantial breach of contract has no right to complain of subsequent breaches by the other party

thereto. Scientific Packages, Inc. v. Gwinn, 134 Colo. 233, 301 P.2d 719 (1956). Defendants committed the first and only breach in this case by telling Western and Utah DOGM that Defendants would not assume all reclamation obligations, by urging only a partial permit transfer, and by refusing to take those actions necessary to allow a transfer of the complete operating permit for the Drum Mine. This obligation included accepting and bonding for all reclamation including the unpermitted heaps and the topsoil deficiency.

Every contract contains an implied duty of good faith and fair dealing. Restatement 2d, Contracts, § 205 (1981). A claim for breach of this covenant is a claim for money damages, and because no money damages are being awarded for Defendants' breach, there can be no recovery for the breach of the covenant of good faith and fair dealing.

An agent acting on behalf of a disclosed principal cannot be held personally liable for breaches of contract. Fink v. Montgomery Elevator Company, 161 Colo. 342, 421 P.2d 735 (1966). The evidence was insufficient to establish that Ed King was a party to the contract, and this being a necessary element of Western's claims against him for breach of contract, Western's claims against Mr. King cannot be established.

ORDERS

IT IS ORDERED AND ADJUDGED that as to Western's first claim for injunctive relief, that claim is moot and has been withdrawn by

Western. The Court has found for Western and against the Defendants on the second claim for relief for reformation. and judgment entered on this claim on February 23, 1993, nunc pro tunc to January 27, 1993. As to Western's third claim for relief, breach of contract - damages, the Court finds for Defendants and against Western for failure to establish money damages as discussed above. On Western's fourth claim for relief, breach of contract - specific performance - this Court finds for Western and against Defendants and specifically Orders that Defendants, ASOMA and Jumbo, are to forthwith perform all contract obligations to assume all reclamation at the Drum Mine; this obligation includes undertaking forthwith whatever bonding requirements are required by the appropriate authorities in the State of Utah to effectuate the clear purpose of this contract, which is that Defendants assume all reclamation responsibilities. As to Western's fifth claim for relief for the breach of the covenant of good faith and fair dealing, the Court finds for Defendants and against Western for the same reasons related to the failure to establish money damages in connection with the third claim for relief.


On Defendants' counterclaims for breach of contract, the Court finds for Western and against Defendants, there having been an anticipatory repudiation and breach of the contract by Defendants in April 1989. Judgment enters against the Defendants Jumbo and ASOMA.

All claims against Ed King in his individual capacity are dismissed.

Western shall perform all of its contractual obligations, including its obligations to transfer to ASOMA all permits necessary to operate the Drum Mine and to execute and deliver to ASOMA and Jumbo all documents that might reasonably be required to do so.


DONE AND SIGNED this 16 day of May, 1994.

BY THE COURT:


Tom Woodford
District Court Judge

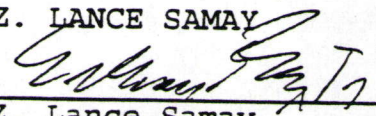
APPROVED AS TO FORM:

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